



**Maina v M'Rimbera (Civil Appeal 57 of 2018)
[2023] KEHC 22772 (KLR) (Civ) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22772 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL 57 OF 2018**

CW MEOLI, J

SEPTEMBER 28, 2023

BETWEEN

BENSON MAINA APPELLANT

AND

BERNARD GITUMA M'RIMBERA RESPONDENT

RULING

1. This ruling is in respect to the Notice of Motion dated 6th December, 2022 (the application) brought by Bernard Gituma M'rimbera (hereafter the Respondent/Applicant) and seeking an order directing Benson Maina (hereafter the Appellant/Respondent) to deposit the decretal sum of Kshs. 888,350/- in court as security.
2. The application is expressed to have been brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (the Act); Orders 42, Rule 7 and 51, Rule 1 of the *Civil Procedure Rules* (the Rules) and is anchored on the grounds set out on its body. The application is supported by the affidavit of James Mandare. To the effect that judgment was obtained before the lower court in favour of the Respondent/Applicant but that the Appellant/Respondent has made it difficult for the former to execute the decree.
3. The deponent stated further that the Appellant/Respondent's application for stay of execution was eventually dismissed on 26th January 2018. That since filing the appeal, the Appellant/Respondent has not only delayed in prosecuting the appeal but also failed to move the court for issuance of stay orders, all in an attempt to avoid depositing the decretal sum as security, resulting in prejudice to the Respondent/Applicant. That it is therefore in the interest of justice that the Appellant/Respondent be ordered to deposit the decretal sum in court as security.
4. The Appellant/Respondent resisted the application through the replying affidavit sworn by his advocate Wangui Kathryn Kimani on 10th February, 2022 averring inter alia, that the delay in



prosecuting the appeal was occasioned by the time taken in obtaining the trial court proceedings in order to perfect the appeal and that in applications seeking to stay execution pending appeal, deposit of security is not a mandatory requirement. For those reasons, the advocate averred that the application ought to be dismissed with costs.

5. At the inter parties hearing, the parties were directed to file and exchange written submissions. On his part, the Respondent's/Applicant's counsel anchored his submissions on the decisions rendered in *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR and *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014] eKLR among others, on the provision of security for the due performance of a decree, as a condition for a stay of execution pending appeal.
6. Counsel further submitted that in the present instance, the Appellant/Respondent appears unwilling to deposit any security in court pending the hearing and determination of the appeal, adding that the Respondent/Applicant who has been kept from his judgment sum for a period of 14 years now, stands to be prejudiced if the order sought is not granted. On those grounds, the court was urged to allow the application.
7. On behalf of the Appellant/Respondent, it was contended by his counsel that the application is misplaced and purely intended to delay the appeal. Counsel further contended that the provision of security for the due performance of a decree is anchored on Order 42, Rule 6(2) of the *CPR* as reaffirmed in *Kioko Peter & another v Josephine Nthenya Kimeu (suing as Legal Representative of the Estate of Justice Kioko Mutisya (Deceased))* [2021] eKLR. That in the present instance, no application seeking a stay of execution has been made by the Appellant/Respondent to warrant the provision of security. It was equally contended by counsel that the appeal emanates from a ruling after the judgment of the trial court and not from the actual judgment/decree. Consequently, the court was urged to dismiss the application, with costs.
8. The court has considered the grounds laid out on the body of the application; the depositions in the affidavits supporting and opposing the application and the rival submissions.
9. The application seeks an order requiring the Appellant/Respondent to deposit security for the due performance of the decree. It is trite law that the provision of security is ordinarily premised on an order staying execution, made pursuant to Order 42, Rule 6 of the *CPR* which states in part that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

- (a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and



- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant”.

10. From the face of the application and material canvassed, it is apparent that the application has not been brought under the above proviso. Rather, it is anchored on the provisions inter alia, of Order 42, Rule 7 of the CPR to the following effect:

- “(1) Where an order is made for the execution of a decree from which an appeal is pending, the court which passed the decree or the court to which an appeal is pending in terms of rule 6 shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the court from whose decree or order such appeal shall have been brought.
- (2) Where an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the court which made the order, or to any court to which such appeal or second appeal shall have been made, be stayed on such terms as to giving security or otherwise as the court thinks fit until the appeal is disposed of.”

11. On a plain reading, the above cited provision is inapplicable to the instant case. First, the present application is by the Respondent and not the Appellant. Secondly, from the averments made by the parties herein, it is apparent that the Appellant/Respondent did not seek and/or obtain an order to stay execution of the decree issued by the trial court, pending the hearing and determination of the present appeal. Upon perusal of the record, the court notes that following delivery of judgment by the trial court on 3rd July, 2009 which prompted commencement of the execution process by the Respondent/Applicant, the Appellant/Respondent filed an application dated 7th February, 2017 before the trial court, seeking to set aside the judgment.
12. The record further shows that the trial court granted an interim order to stay execution and upon interparties hearing, proceeded to dismiss the said application vide the ruling delivered on 26th January, 2018. Looking at the grounds contained in the memorandum of appeal filed in the present appeal, it is evident that the aforesaid ruling is the subject of the present appeal.
13. Be that as it may, there is nothing to indicate that the Appellant/Respondent subsequently sought and/or obtained a substantive order to stay execution pending appeal, either before the trial court or before the High Court. Hence, there is currently no order in place to bar the Respondent/Applicant from proceeding to execute the decree issued by the lower court in the usual way. His present application is a misconceived attempt to circumvent the normal execution process under the appropriate provisions of the law. Equally, if the Appellant/Respondent has been slow in prosecuting the appeal, nothing prevents the Respondent/Applicant from seeking its dismissal. In the circumstances, there is no legal or factual basis upon which the court can grant the order sought herein.
14. The upshot therefore is that the Notice of Motion dated 6th December 2021 is without merit and is hereby dismissed. Given the nature of the application, the court orders the parties to each bear their own costs of the application. However, noting that this appeal has been pending for almost five years



and survived dismissal for want of prosecution in 2021, the Court will hereafter issue appropriate directions to expedite its determination.

DELIVERED AND SIGNED AT NAIROBI ON THIS 28TH DAY OF SEPTEMBER 2023.

C.MEOLI

JUDGE

In the presence of:

For the Respondent/ Applicant: Ms. Wangui Kimani

For the Appellant/ Respondent: Mrs. Githaiga

C/A: Carol

Page | 6

